

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-139607-001 DT

06/25/2013

HONORABLE JOSEPH KREAMER

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

KRISTIN SHERMAN

v.

JUSTIN OTIS MCMAHAN (001)

VICTORIA ELISABETH WASHINGTON
GARRETT W SIMPSON

CAPITAL CASE MANAGER

MINUTE ENTRY

CR2007-133812-001 Jesus Arturo Martinez, Jr.
CR2009-160953-001 Rudolph John Cano, Jr.
CR2010-007882-001 Jasper Phillip Rushing
CR2010-007912-001 Darnell Reuna Jackson
CR2010-007912-002 Eldridge Auzzele Gittens
CR2010-048824-001 James Clayton Johnson
CR2010-168096-001 Craig Michael Devine
CR2011-005473-001 Abel Daniel Hidalgo
CR2011-008004-001 Dennis Michael Levis
CR2011-008004-002 Thomas Michael Riley
CR2011-133622-001 Jesus Busso-Estopellán
CR2011-138281-001 Jason Neil Noonkester
CR2011-140108-001 Jose Alejandro Acuna Valenzuela
CR2011-150239-001 Ryan William Foote
CR2011-151833-001 Jonathan Ray Cole
CR2012-007399-001 Zachary William Baxter
CR2012-139607-001 Justin Otis McMahan
CR2012-154880-001 Manuel Antonio Gonzalez

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The parties above were permitted to join in Defendant Gittens' Motion to Dismiss the Death Penalty, originally filed on June 29, 2012. The Court also permitted supplemental briefing on multiple issues related to the original Motion and conducted oral argument on January 25, 2013 and May 3, 2013. At oral argument on January 25, the Court denied Defendants' request for an evidentiary hearing and rejected Defendants' claim that the Arizona death penalty statute violated the Equal Protection Clause of the United States Constitution and Articles II and IV of the Arizona Constitution. At oral argument on May 3, 2013, the Court rejected Defendants' argument that the Arizona statute fails to adequately narrow the class of defendants eligible for the death penalty (the "*Furman*" Motion) and thus denied the remainder of the original Motion to Dismiss. At the conclusion of the May 3 oral argument, the Court agreed to summarize its holding in a written minute entry. This is that minute entry.

At the outset, it should be noted that the Court thoroughly discussed its rulings and the basis for those rulings at the January 25 and May 3 oral arguments. This minute entry will not repeat all of the issues and arguments raised; the transcripts are the best record of the Court's holdings and rationale. Additionally, this minute entry will not again discuss rulings the Court made that do not directly resolve the two central arguments made in the original Motion, including Defendants' request for an evidentiary hearing and issues surrounding Defendants' attendance at the hearings on the Motion. The Court believes that the record is sufficiently developed on those issues for purposes of clarity on appeal.

EQUAL PROTECTION

Defendants argued that A.R.S. §13-751, Arizona's death penalty statute, violates the Equal Protection Clause because similarly-situated defendants are disparately treated, depending on where they live in Arizona. Specifically, Defendants argued that prosecutors in poorer counties often fail to seek the death penalty even in the most egregious cases because of financial concerns. Defendants argued that this violates Equal Protection because there is no "principled basis" for this disparate treatment and the death penalty allegation is made "simply at the whim of the prosecutor."

The Court denied this portion of Defendants' Motion at the January 25 oral argument. The Court found then and reiterates now that in order to demonstrate an Equal Protection violation, a defendant must demonstrate that the decision-makers in his particular case acted with a discriminatory purpose as to the particular defendant. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756 (1987). Defendants have made no argument that the State has acted with discriminatory intent as to any of the individual Defendants joined in this Motion.

Further, the Arizona Supreme Court has made it clear that the decision by one county not to seek the death penalty while a similarly situated defendant in another County might be faced

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with the death penalty does not constitute an Equal Protection violation. In *State v. Ovante*, 231 Ariz. 180, 185-86, 291 P.3d 974, 979-80 (2013), the Court held that a showing that defendants in Maricopa County are more likely to receive the death penalty than similarly-situated defendants in other counties did not constitute an Equal Protection violation, noting that *McCleskey* requires a showing of purposeful discrimination against a particular defendant in his particular case. Thus, inconsistent application of the Arizona statute from county to county, including the decision of one county not to seek the death penalty for economic reasons or otherwise, is not an Equal Protection violation. See also *State v. White*, 194 Ariz. 344, 353, 982 P.2d 819, 828 (1999) (Equal Protection means only that the death penalty may be applied to all persons in the State in a like position. Persons convicted of the same crime can constitutionally be given different sentences).

Because Defendants have failed to allege purposeful discrimination aimed individually at them in their cases, Arizona's statute does not violate Equal Protection.

THE FURMAN ARGUMENT

Defendants' second main argument is that A.R.S. §13-751, Arizona's death penalty statute, is unconstitutional because it fails to adequately narrow the class of persons eligible for the death penalty. Defendants allege that every first degree murder case filed in Maricopa County in 2010 and 2011 had at least one aggravating factor under A.R.S. §13-751(F). Defendants sought an evidentiary hearing to prove this allegation. The Court denied the request for an evidentiary hearing, but accepted the facts as alleged by Defendants for purposes of resolving the legal issue raised in the Motions. Thus, the question presented to the Court is whether, assuming every first degree murder case filed in Maricopa County in 2010 and 2011 had at least one aggravating factor, the Arizona Death Penalty Statute fails to adequately narrow the class of persons eligible for the death penalty.

The Court first notes that there is a strong presumption that legislative enactments are constitutional, and a party who challenges the validity of a statute has the burden of overcoming that presumption. E.g., *State v. Takacs*, 169 Ariz. 392, 395, 819 P.2d 978, 981 (App. 1991). Courts therefore must give statutes a constitutional construction whenever possible. *Id.*

Against this backdrop, "[i]f a state has determined that death should be an available penalty for certain crimes, it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (citations omitted). Accordingly, "a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to

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others found guilty of murder.” *Lowenfield v. Phillips*, 484 U.S. 231, 244 (1988) (citation omitted).

Defendants argue that if every first degree murder case in Maricopa County for two years had at least one aggravating factor, then by definition the aggravating factors perform no narrowing function, and the entire Death Penalty Statute is thus unconstitutional under *Lowenfield et al.*

The Court disagrees. First, this argument has previously been rejected by the Arizona Supreme Court. In *State v. Greenway*, 170 Ariz. 155, 823 P.2d 22 (1991), the defendant argued that the number and breadth of the aggravating factors contained in the Death Penalty Statute failed to narrow the class of persons eligible for the death penalty. The Arizona Supreme Court rejected this argument and held:

We also reject defendant’s argument that our legislature has not narrowed the class of persons eligible for the death penalty. Only those persons convicted of first degree murder as defined in A.R.S. §13-1105 are eligible for the death penalty. [citation omitted]. Moreover, only when the State has proven *one or more* aggravating factors and there are no mitigating factors sufficient to call for leniency will a person convicted of first degree murder receive the death penalty. ... Furthermore, this narrowing process may take place “at either the sentencing phase of the trial or the guilt phase.” [citing *Lowenfield, supra*]. Arizona’s death penalty statute narrowly defines the class of death-eligible persons. Therefore, it does not offend the Constitution.

Id., 170 Ariz at 164, 823 P.2d at 31 (italics in original).

The Arizona Supreme Court recently rejected this argument again, albeit in cursory fashion. See *State v. Hausner*, 230 Ariz. 60, 89, 280 P.3d 604, 633 fn. 9 (2012) (rejecting the argument that the broad scope of Arizona’s aggravating factors encompasses nearly anyone involved in a murder, in violation of the United States and Arizona Constitutions). Further, both the Ninth Circuit and the United States District Court for the District of Arizona have also rejected arguments that the Arizona Death Penalty Statute is unconstitutional because it does not properly narrow the class of death penalty recipients. See *Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998); *Spreitz v. Ryan*, 617 F. Supp 2d 887, 921 (D. Ariz. 2009)(citing *Stewart*).

Defendants correctly point out that *Greenway* was decided at a time when there were fewer aggravating factors contained in the statute than today, and before the (F)(2) aggravating

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factor was expanded to include serious felonies committed at the same time as the murder.¹ *Greenway* was arguably in a different posture from these Defendants, who assert that all or virtually all first degree murder cases now contain at least one aggravating factor.

The flaw in Defendants' argument is that it fails to recognize that the required "narrowing" function can and does occur by means other than the aggravating factors contained in § 13-751(F). The narrowing function begins at the "definition" stage, with the classification of the homicide as murder, followed by the classification to either first or second degree murder. The statute further narrows the class of persons eligible for the death penalty by exempting those with intellectual disabilities. *See* A.R.S. §13-753(A). In addition, as noted in *Lowenfield*, the jury itself performs a narrowing function. "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Lowenfield*, 484 U.S. at 244-45. *See also Greenway*, 170 Ariz. at 164, 823 P.2d at 31 (recognizing that the narrowing process may take place at either the sentencing phase or the guilt phase).

The Court recognizes that language in Arizona cases suggest that narrowing at the definition stage may be insufficient, and that the aggravating circumstances themselves must perform an independent narrowing function. *See State v. Carlson*, 202 Ariz. 570, 582, 48 P.3d 1180, 1192 (2002)(the death penalty "should not be imposed in every capital murder case but, rather it should be reserved for cases in which the manner of the commission of the offense or the background of the defendant places the crime 'above the norm of first degree murders'"). The Court further recognizes that the Defendants have offered to establish a fact not previously established in an Arizona case – that the aggravating factors in Arizona's current death penalty statute encompass every first degree murder case filed during a broad timeframe.

However, the Court is bound by the Arizona Supreme Court's holdings, by the language of *Greenway* and *Hausner*, and by the recognition in various cases that the requisite narrowing function of the statute can constitutionally occur outside the enumerated aggravating factors found in A.R.S. §13-751.

Accordingly, for the reasons set forth above and as set forth in detail at the May 3, 2013 oral argument, Defendants' Motions are DENIED.

¹ When the defendant in *Greenway* was charged in 1988, Arizona's death penalty statute identified ten statutory aggravating factors. There are now fourteen. *See* A.R.S. § 13-751(F).

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